COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-000215-D

JOHN CHARALAMBAKIS — APPELLANT

v.

ASBURY UNIVERSITY, SANDRA GRAY, JON KULAGA, GREGORY SWANSON, DON ZENT, and C.E. CROUSE — APPELLEES

KENTUCKY COURT OF APPEALS
NO. 2012-CA-000242
AND
JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY
CIVIL ACTION NO. 10-CI-00880

APPELLEES' BRIEF

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2015, ten (10) copies of the following Appellees' Brief were hand delivered to: Hon. Susan Stokley Clary, Clerk, Kentucky Supreme Court, Room 209, Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; and true and accurate copies were also served by first class mail upon Judge C. Hunter Daugherty, Jessamine County Courthouse, 101 North Main Street, Nicholasville, KY 40356, Katherine K. Yunker, Yunker & Park PLC, P.O. Box 21784, Lexington, KY 40522-1784, and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

Respectfully submitted,

Leila G. O'Carra

Debra H. Dawahare
Leila G. O'Carra
WYATT, TARRANT & COMBS, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507-1746
859.233.2012

STATEMENT CONCERNING ORAL ARGUMENT

Asbury University respectfully requests oral argument to supplement the parties' briefs. All Kentucky employers subject to the Kentucky Civil Rights Act ("KCRA") will suffer if this Court overturns lower courts' decisions not to allow a plaintiff to avoid well-deserved disciplinary action by making false claims under the KCRA.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

John Charalambakis sued Asbury University for breach of contract, defamation, and national origin discrimination and retaliation after Asbury fired him for using his position at Asbury and Asbury's name and credibility to promote his own questionable ventures. He has not appealed the lower courts' judgments against him as to breach of contract or defamation, but he continues to assert that his claims for discrimination and retaliation should be revived.

Asbury received complaints that Charalambakis, a tenured professor, bilked donors and investors in his private businesses, and underpaid and otherwise mistreated his employees, who were recent Asbury graduates. In response to Asbury's request that Charalambakis explain his actions, he made false and vague allegations of national origin discrimination against the school, and threatened to (and eventually did) file charges with the Kentucky Commission on Human Rights, all to manipulate Asbury's ongoing disciplinary process. Without proof to support his fabricated claims, he could not convince Asbury's Faculty Appeals Committees or President, the Jessamine Circuit Court, a Jessamine County jury, or the Court of Appeals to find in his favor. At least five different groups have already reviewed (sometimes more than once) and unanimously rejected Charalambakis's claims.

Appellant's statement of material facts contains numerous inaccuracies and significant omissions. No reasonable jury could find in Charalambakis's favor on the complete and actual facts, summarized below.

Asbury hired Charalambakis, a native of Greece, as an assistant professor in Spring 1992, promoted him to associate professor and granted him tenure in 1996,

and promoted him to full professor in 2003. [VR No. 1: 11/14/11, 3:15:47].[1] Charalambakis traveled to Greece often over the years, and was generally unavailable for the daily administrative tasks that fell to other full-time faculty members. [RA Dep. Folder, Pl. depo., pp. 124-125, 207-208].[2] Charalambakis and Asbury's administration had ongoing discussions about balancing his duties to Asbury with his insistence that pressing international business interests constantly consumed his time. [Id. at Exs. 24-26].

In the decade before his termination, Charalambakis organized, ran, or took income from a number of small corporations, most of which he had formed. [VR No. 3: 11/15/11, 2:12:56]. All of them failed after Charalambakis had used them as sources of personal income, and Charalambakis's conduct through those corporations led to the complaints that resulted in his dismissal. [RA Trial Ex. Folder, PX2].[3]

One of Charalambakis's ventures was the Philadelphia International Foundation ("PIF"), a non-profit corporation for which he, as the entity's sole "executive," raised at least $300,000 in donated funds between its 1998 inception and its 2006 dissolution. [VR No. 3: 11/15/11, 2:12:56]. PIF's ostensible purpose was to build a hospital in Greece. [Id. at 2:13:42]. During PIF's existence,

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[1] The time displayed on the discs in the trial video record is one hour ahead of the actual time.

[2] Deposition testimony and exhibits are cited throughout this brief, in addition to trial testimony and exhibits, because this case has a Byzantine back story that was fully developed at deposition, and of which Asbury and the trial court were aware when making their decisions concerning Charalambakis and this litigation, respectively.

[3] All trial exhibits are located in the Record on Appeal ("RA") in the trial exhibit folder. Hereinafter, Charalambakis's trial exhibits are cited as "PX__," Defendants' as "DX__" and the single joint exhibit as "JX1."

Charalambakis took many PIF-funded trips each year to Greece, where Charalambakis's family lives. [Id. at 2:14:00]. Charalambakis admits that in addition to his travel expenses, he was paid around $200,000 in salary as PIF's sole executive. [RA Dep. Folder, Pl. depo., pp. 120, 123-124, 128-129]. PIF's donors never got their money back after Charalambakis failed to get the hospital project started. [VR No. 3: 11/15/11, 2:14:26]. Eventually, one contributor's estate sued PIF, alleging that PIF had taken $300,000 from the late donor through misrepresentation. [DX2 (Appendix Item "Appx." 1)].

Another of Charalambakis's failed companies was International Management and Economics Consultants ("IMEC"). [VR No. 3: 11/15/11, 2:17:41]. Charalambakis formed IMEC with his former Asbury students Laurence Coppedge and Brent Winslow. [VR No. 7: 11/17/11, 2:50:30]. His former Asbury student Jessica Blackburn was IMEC's part-time clerical employee (and PIF's full-time office manager). [VR No. 6: 11/16/11, 4:14:45]. Charalambakis testified that he made a thousand dollars a month for approximately a year as IMEC's managing director. [RA Dep. Folder, Pl. depo., p. 140].

Blackburn and Coppedge later complained to Asbury about how Charalambakis treated them during IMEC's brief existence. [VR No. 6: 11/16/11, 4:16:54; VR No. 7: 11/17/11, 2:54:18]. Coppedge was concerned about how Charalambakis had handled investors' money, how Charalambakis treated Blackburn, and how Charalambakis targeted students with money.[4] [VR No. 7:

[4] Coppedge himself was one such student. He reached a breaking point with Charalambakis after money he invested with Charalambakis disappeared, reappeared *in Charalambakis's*

11/17/11, 2:52:40-3:04:50]. Blackburn informed Asbury that Charalambakis regularly screamed at her, failed to pay her wages as the law requires, and mishandled investors' funds. [VR No. 6: 11/16/11, 4:17:46 – 4:26:08].

In 2009, Charalambakis organized other companies under variants of the Carpe Diem name. One or more of the Carpe Diem companies employed Charalambakis's former Asbury student Adam Wood. [DX3 – 5]. Wood reported to Asbury in 2009 that Charalambakis underpaid him, that Charalambakis tried after the fact to designate him as an "independent contractor" rather than as an employee to avoid paying employment taxes for him, and that one of the Carpe Diem entities was importing wine from Greece to the United States, which violated Asbury's requirements for tenured professors. [DX14]. After Wood reported Charalambakis's behavior to Asbury, Charalambakis lodged felony theft charges against him and had him arrested at Asbury's 2010 graduation ceremonies, though the thefts of which Charalambakis accused Wood had allegedly happened in 2008. [VR No. 5: 11/16/11, 3:18:07]. The Jessamine Circuit Court dismissed and expunged the criminal charges against Wood upon a determination that the alleged "thefts" were actually wages that Charalambakis paid to Wood.[5] [Id. at 3:19:55 – 3:21:47]. Meanwhile, Charalambakis battled the Labor Cabinet (eventually settling

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mother's bank account, and then again went missing for two weeks. [VR No. 7: 11/17/11, 3:13:45 – 3:17:07].

[5] Wood bore the brunt of Charalambakis's anger at having exposed his abuse of his former students. In addition to filing false criminal charges and summoning police to take Wood to jail in front of Wood's family, including his pregnant wife, Charalambakis filed a civil suit against Wood. [Id. at 3:21:48]. Wood's ordeal continues: the civil suit is still pending in Jessamine Circuit Court.

that claim)[6] and the IRS (unsuccessfully) over his insistence that Wood was an independent contractor rather than an employee. [Id. at 3:10:50; DX11 (Appx. 2)].

Another complaint came from Wesley Biblical Seminary in Jackson, Mississippi. Charalambakis claims to have invested about $400,000 of his own money in an enterprise supposedly formed to build an apartment complex in France between 2005 and 2008. [RA Dep. Folder, Pl. depo., pp. 303-304]. He told personnel at Wesley Biblical Seminary, that he had enough confidence in this investment to place a large amount of his own money in it, and that he expected the investment to return 50-60%. [Id. at 306-307]. Ron Smith, President of Wesley Biblical and an Asbury graduate, and other Mississippi investors connected with Wesley Biblical, invested well over $1 million in the project. [VR No. 4: 11/15/11, 3:58:36; 4:25:40; 4:43:31]. Smith testified that Wesley Biblical invested $400,000 of its endowment fund by writing a check to IMEC and delivering it to Charalambakis.[7] [Id. at 4:13:20; 4:46:08; 4:48:18]

As time passed with no return on the Wesley Biblical endowment money he had invested and no news of its whereabouts, Smith became anxious, not only about Wesley Biblical's investment, but about the funds that other investors had given Charalambakis. [Id. at 4:43:47; 4:51:16]. Smith mentioned his concern about these investments to Asbury's General Counsel, Greg Swanson. [Id. at 4:52:30]. Charalambakis eventually paid back the principal amount of Wesley Biblical's

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[6] Charalambakis submitted to the Labor Cabinet as evidence of wages paid to Wood the very same checks that he told law enforcement Wood had stolen. [Id. at 3:19:55 – 3:21:47].

[7] Charalambakis and his wife built their house, valued at over $700,000, the same year that Charalambakis convinced the Mississippi investors to contribute over a million dollars to the French "housing project" that never materialized. [RA Depo. Folder, Pl. Ex. 1 (Appx.3)].

investment money. [Id. at 4:52:02]. There is no evidence that the apartment project in France ever came to be.

Charalambakis's tax returns for 2006-09 do not match his lavish lifestyle during those years, with the expensive house and the many annual trips to Greece, nor do they match his testimony about the additional income he took over the years from the corporations he formed, funded with investors' money, and abandoned. The tax returns show the family's sole significant source of income as Asbury University, where Charalambakis earned less than $60,000 per year. [DX1]. Charalambakis's tax returns for 2006-2009 show significant losses from his business activities, which resulted in tax write-offs. [Id.] In 2009, for example, he reported a business loss of $22,000, based upon an allegedly failed deal to broker a sensitive and secret international sale of gold bullion, which he says was worth millions of dollars to him in commissions alone.[8] [Id.].

After Asbury received the complaints summarized above, Charalambakis's termination process began with a letter from Provost Jon Kulaga dated June 17, 2009, detailing professional misconduct "of such a serious nature as to merit reconsideration of your continued employment with the college." [PX1]. In a follow-up letter, the Provost described specific instances of misconduct, cited the

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[8] Asbury did not learn of the alleged gold bullion deal before discovery in this case. Charalambakis claims that he was the key to this mysterious international deal. [RA Dep. Folder, Pl. depo., pp. 77-82]. He claims that the sensitive deal went sour because, for the six weeks he was actually on probation at Asbury, he could not be involved in negotiations, and nobody, not even the firm of Frost Brown Todd, could find a way to make arrangements progress without him. [Id. at 81]. Asked why, as a matter of common sense, Charalambakis would let a multi-million dollar sure deal go sour rather than risk his position earning less than $60,000 per year at Asbury, Charalambakis stated that he did it because he loved Asbury. [Id. at 79].

Faculty Manual, and informed Charalambakis that the Provost had received complaints from former students Wood, Blackburn, and Coppedge. [PX2].

Charalambakis responded in a letter dated June 30, 2009, in which he referred to the Provost's concerns as "unsubstantiated" and "entirely baseless." [PX4]. Charalambakis then began his first side fight,[9] by trying to convene the University's Faculty Personnel Committee (FPC).[10] [RA Dep. Folder, Pl. depo. Ex. 60]. The Faculty Manual provision about the FPC states that it *reviews policies* about personnel matters. [JX1, p. 48]. There is nothing in the Faculty Manual providing that an aggrieved employee has his choice of Faculty Appeals Committee proceedings or FPC proceedings, nor is there any provision for redundant review. [Id. at p. 52-53]. Charalambakis continued to insist all the way through trial, that he had a right to an FPC review of the Provost's decision to terminate him.

When his attempts to involve his friends and invoke inapplicable sections of the Faculty Manual failed to derail his disciplinary process, Charalambakis first mentioned discrimination in a letter to the Provost, in which he was supposed to provide his response to his former students' reports of his misconduct. This initial accusation of discrimination came four months into the disciplinary process, after it became clear that some form of discipline would be imposed. Shortly before the disciplinary process concluded, Charalambakis directed his friend, Dave Coulliette, to tell the Provost that Charalambakis had filed a charge of discrimination against

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[9] Later, Charalambakis presented the Provost's letters to the American Association of University Professors, the Kentucky Commission on Human Rights, and a number of his colleagues at Asbury. [RA Dep. Folder, Pl. depo., p. 587].

[10] Charalambakis's good friend, Prof. Dave Coulliette, chaired the FPC. [VR No. 7: 11/17/11, 12:37:55]. Couliettte testified that to his knowledge, the FPC has never before been convened to review anyone's disciplinary proceedings. [Id. at 12:38:37].

Asbury. Although Charalambakis had not filed a charge, and no charge was actually filed until 2010, Charalambakis attempted to use threatened and actual KCHR proceedings as a bargaining chip through the remainder of the disciplinary process, offering at least twice to drop his charge when he thought the offer might gain him leverage. [RA Dep. Folder, Pl. depo. Ex. 150 and PX46]

Provost Kulaga wrote to Charalambakis on November 24, 2009, explaining that he believed Wood, Blackburn, and Coppedge had voiced valid concerns. [PX3]. The Provost noted Charalambakis's lack of accountability to the University and lack of conformity with its policies, his baseless accusations, and his attempts to manipulate colleagues and professional organizations for his own ends. [Id.]. The Provost's letter concluded by saying that while Charalambakis's multiple violations of the Faculty Manual supported termination, but that instead, Charalambakis would instead have two years' probation, during which he could not engage in any outside employment. [Id.]. Charalambakis appealed the decision to the Faculty Appeals Committee, which unanimously affirmed Charalambakis's probation. [PX10, PX39]. Charalambakis agreed in writing to the terms of the probation on March 1, 2010. [PX20].

Provost Kulaga wrote to Charalambakis on March 29, 2010 to determine whether Charalambakis was still involved in outside businesses. [PX22]. Charalambakis responded with an insubordinate letter.[11] [PX23]. In addition, the

[11] Charalalambakis wrote, for example, that he was responding to the Provost's letter "under protest, mindful of the fact that you have no legal right to dictate the private arrangements in businesses in which you are not involved..." Further, Charalambakis wrote, "This is getting ridiculous! ...how in the world do you dare to say that [my college-aged son, Joel] is

Provost received an accusatory e-mail from Charalambakis's teenage son, Joel, who had supposedly taken over Charalambakis's business ventures. [DX10 (Appx. 4)]. On April 1, 2010, Charalambakis's wife made numerous accusations in a meeting with Dr. Donald Zent (the chair of Charalambakis's FAC). [PX45 (Appx. 5)]. Dr. Zent also received a phone call from the Kentucky Judicial Conduct Commission on March 31, 2010, inquiring about the conduct of former Asbury Board Member Tim Philpot, based on a complaint from Charalambakis.[12] [Id.]

Convinced that Charalambakis had not distanced himself from his outside business interests,[13] and unimpressed with Charalambakis's accusatory response to Asbury's request for assurances on this subject, the Provost sent Charalambakis a termination letter on April 14, 2010. [PX 24]. On May 11, 2010, Charalambakis convened another FAC to appeal his termination. [PX25]. This FAC denied his appeal on June 7, 2010. [PX26].

Charalambakis filed his Complaint in this lawsuit on August 3, 2010 [RA 2-8], and amended it on September 27, 2010 [RA 17-24]. On December 3, 2010, the court entered the parties' Agreed Scheduling Order. Charalambakis requested (usually after deadlines had passed) and the court granted many extensions of the deadlines.

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not competent enough to run the business...?" He signed the letter "Deeply disappointed and disgusted, John E. Charalambakis."

[12] Before taking the bench, Judge Timothy Philpot was on the board of an entity that owned a building where both PIF and IMEC had offices, and he called Charalambakis to request payment of overdue rent. [VR No. 4: 11/15/11, 5:15:40 – 5:18:11]. After Asbury began termination proceedings against Charalambakis in 2009, Charalambakis complained to the KJCC, alleging that Philpot, a former member of Asbury's Board of Trustees, had harassed him. [Appx. 6].

[13] Charalambakis told the Provost that he had turned his companies over to his college-aged son Joel to run from the basement of the family home. [VR No. 7: 11/17/11, 4:42:25 – 4:43:29].

After hearing hours of argument on the Defendants' motion for summary judgment, the court dismissed Charalambakis's KCRA claims. [RA 1402-05; 1778-80]. At the hearing, Charalambakis requested time to come up with his case on defamation, which the court granted.[14] [VR 10/27/11, 2:23:58, 2:26:55]. The court held additional hearings during which Charalambakis had additional chances to explain why his retaliation claim should survive summary judgment. [VR 10/31/11, 8:33:31; 11/9/11, 2:12:15]. Charalambakis could not convince the court that he had an actionable claim. The jury unanimously rejected Charalambakis's breach of contract claim on November 18, 2011. [VR No. 9: 11/18/11, 6:16:25; RA 1764-1768]. The Court of Appeals upheld the trial court's summary judgment and the jury's verdict on January 31, 2014, and denied Charalambakis's motion for rehearing on March 25, 2014.

ARGUMENT

This Court must reject Charalambakis's request for remand to the Circuit Court for trial on his national origin discrimination and retaliation claims. Charalambakis's retaliation claim fails for the simple reason that termination proceedings were already underway by the time he filed or even threatened his KCRA charge. Even without the timing issue, the retaliation claim could not possibly survive under the "but for" causation standard announced in *Nassar*. *University of Taxas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). The underlying discrimination claim fails for lack of evidence. Charalambakis's sole evidence of

[14] The court dismissed the defamation claim on the eve of trial when the Appellant failed to present proof of special damages, an essential element of his claim, despite numerous extensions of time to do so. [VR No. 1:11/14/11, 10:13:34, 10:16:11]. Appellant has not requested this Court's review of the dismissal of his defamation claim.

discrimination is that the Provost allegedly referred to his accent twice, both times several years before disciplinary action against him began. There is no evidence of discrimination in the record. Charalambakis fabricated his discrimination claim in an attempt to gain leverage near the conclusion of ongoing disciplinary proceedings. He interjected his baseless discrimination claim into the disciplinary process, and then claimed retaliation when Asbury failed to drop its in-progress disciplinary action. Asbury was not legally required to ignore Charalambakis's significant misconduct and halt its disciplinary process once it learned of his KCHR charge. The trial court correctly dismissed Charalambakis's KCRA claims, and the Court of Appeals properly upheld the trial court's decision.

I. Charalambakis's national origin discrimination claim is utterly baseless.

Charalambakis claims that he established a triable case of national origin discrimination by alleging that Provost Kulaga made two comments about his accent in 2007, then terminated his employment in 2010. Charalambakis says that in Fall 2007, Kulaga asked him if his students understood his accent. [RA Dep. Folder, Pl. depo., pp. 32-33]. Charalambakis also says that around the same time, the Provost remarked to him that the implications of a book entitled *The Black Swan* were not as funny as his accent. [Id. at 33-34]. *These isolated remarks allegedly made years before Charalambakis's disciplinary proceedings are the only two anti-Greek sentiments Charalambakis attributes to the Provost or to Asbury.* [Id. at 548-549].

"Statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself [cannot] suffice to satisfy the plaintiff's

burden ... of demonstrating animus." *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir.1998) (internal quotation marks omitted).[15] Charalambakis's national origin discrimination claim could not proceed to trial without any evidence of discriminatory animus. "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

After the trial court dismissed Charalambakis's KRS 344.040 claim, recognizing that he had not presented any evidence from which a reasonable inference of discrimination could be drawn, Charalambakis attempted to manufacture some proof. He referred to an interrogatory answer in which he alleged that he told Provost Kulaga that he wanted to apply to be chair of the economics department, and that the Provost responded, "but John you have an accent." [RA Dep. Folder, Pl. depo., Ex. 66, p. 12]. However, at Charalambakis's deposition taken approximately two months after he served these written discovery responses, he admitted that he had already served as chair of the department just a few years earlier, and that the Provost's response to his inquiry about the chair position was actually "John you cannot be the chair." [Id. at 9, 35-36]. Charalambakis admitted, "**I don't know why he doesn't want me to be the chair.**" [Id. at 36]. Charalambakis admitted that the professor chosen as chair, Steve

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[15] "The Kentucky Civil Rights Act was modeled after federal law, and our courts have interpreted the Kentucky Act consistently therewith." *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003).

Clements, had expertise in Political Science that Charalambakis lacked, and that Clements "would be good." [Id. at 85].

Charalambakis also claimed that Provost Kulaga failed to approve him as a student group advisor in the fall of 2008 based on discrimination. Again, Charalambakis's sole basis for this belief is his allegation that Kulaga made two comments about his accent in 2007. [RA Dep. Folder, Pl. depo., p. 37]. As explained above, comments unrelated to the decisional process cannot establish discriminatory animus. *Bush, supra.*

Charalambakis's allegations about other Asbury employees' alleged transgressions, all dissimilar to his own, do not support his discrimination claim.[16] Charalambakis admitted that all his stories about other Asbury employees were mere hearsay, inadmissible at trial and inappropriate for consideration on summary judgment. [RA Dep. Folder, Pl. depo., pp. 516-521]. He has no evidence that any non-Greek Asbury faculty member engaged in misconduct and received more favorable treatment. [Id.]

Moreover, in Charalambakis's KCHR charge, which is a sworn statement, Charalambakis avers that *the first act of national origin discrimination against him occurred on November 24, 2009* (the date of the Provost's letter advising Charalambakis that although there were grounds for termination, the Provost would put him on probation for two years). [RA Dep. Folder, Pl. depo. Ex. 101]. The Sixth Circuit has held that in an employment discrimination action, a court may regard the

[16] Charalambakis argued in closing that no one else at Asbury was fired for violating the alcohol policy or the outside business policy. [VR No. 9: 11/18/11, 03:12:00]. The jury rejected Charalambakis's implication that this allegation undermined Asbury's legitimate reasons for firing him by finding that Asbury had sufficient cause for its decision.

former employee's sworn statements in a charge of discrimination filed with an administrative agency as "admissions against interest." *Geromette v. General Motors Corp.*, 609 F.2d 1200, 1202 (6th Cir. 1979). Charalambakis's own sworn admission precludes his attempt to support his baseless discrimination claim with allegations of 2007 comments and conduct.

Charalambakis cannot overcome Asbury's legitimate, non-discriminatory reasons for placing him on probation and then firing him. Asbury's Provost, President, two Faculty Appeals Committees,[17] and the jury at the trial of this matter have all unanimously concluded that Asbury had adequate cause to terminate Charalambakis's employment. Though the trial court dismissed Charalambakis's KCRA claims, Charalambakis was still allowed to tell the jury about his allegations of discrimination and retaliation. [VR 11/14, 5:15:05]. His letters alleging discrimination and retaliation were trial exhibits. [PX8, PX10] Charalambakis argued in closing that discrimination and retaliation are never legitimate reasons to terminate a professor's employment. [VR No. 9: 11/18/11, 3:07:43-3:09:00]. The jury ruled against Charalambakis's discrimination and retaliation allegations by finding that Asbury had sufficient cause to terminate Charalambakis's employment.

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[17] The members of Charalambakis's FACs spent days interviewing witnesses and reviewing and discussing the matter. By the conclusion of their many meetings, all agreed that the disciplinary actions were warranted. Don Zent, chair of both committees, described at trial his grief over discovering that Charalambakis, his friend and colleague, was a "classic hypocrite,...someone who pretends to be someone he is not." [PX 43 (Appx. 7)]. Zent testified, "Ultimately, God alone sees the human heart and we as human beings only see the exterior, but it was our duty in the Appeal Committee...to try to discern the truth as best we could understand it and it seemed to us that [Charalambakis] was not being truthful...In my mind, the first step towards healing and restoration, which I was so hoping would happen, is the first step would be an admission of wrongdoing and a willingness to improve. I did not see that in [Charalambakis] at all. Instead, what I saw was belligerence, denial and an accusatory spirit." [VR No. 7: 11/17/11, 10:53:54 – 11:03:27].

Charalambakis has failed to present a reasonable basis on which a second jury could find that discrimination was a reason for the termination of his employment.

II. Charalambakis cannot succeed on his retaliation claim as a matter of law.

A. Asbury had sufficient cause to terminate Charalambakis's employment.

Charalambakis admits that the standard for a retaliation claim is "but-for" causation. "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in §2000e-2(m) [the motivating factor test]."[18] *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013).[19]

A jury has already unanimously determined that Asbury had sufficient cause to terminate Charalambakis's employment. The jury was instructed that Charalambakis was "a professor with tenured status," and that the "rights and duties of John Charalambakis and Asbury College are contained in the 2009-10 Faculty Employment Contract " and the "Asbury Faculty Manual." The jury was further instructed that the Faculty Manual states that "Tenure means that the faculty appointment will continue until the faculty member...no longer meets the Faculty

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[18] The language of Kentucky's civil rights act tracks federal law and must be interpreted consonant with federal interpretation. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992).

[19] The *Nassar* decision applies in Charalambakis's case because it states the "controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review..." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). Kentucky courts have long recognized this binding rule of retroactivity. *E.g., Washington v. Goodman*, 830 S.W.2d 398, 401 (Ky. App. 1992) ("it now seems that the rule of retroactivity in civil cases is limited only by the need for finality.")

General Employment Expectations or Full-Time Teaching Faculty Performance Criteria." The jury was also instructed that the Faculty Manual states:

> **REASONS FOR TERMINATION**
>
> 1. Failure to accept and model the college Statement of Faith and the moral principles that guide the standard of community life.
>
> 2. Gross personal misconduct, particularly flagrant disregard for the standards of compus life outlined in Section 600 of this Faculty Manual.
>
> 3. Inability to carry out or failure to cooperate in carrying out college policies, or insubordination.

Based on those instructions, the jury unanimously found that Asbury had sufficient cause to terminate Charalambakis's employment. Charalambakis has not appealed that verdict before this Court, and the verdict is therefore the unassailable law of the case. [RA 1977-1979] The now-incontrovertible fact that Asbury had sufficient cause to terminate Charalambakis's employment absolutely precludes a finding that, "but for" retaliation, Asbury would not have terminated Charalambakis's employment. Charalambakis's retaliation claim cannot succeed, as a matter of law.

B. Charalambakis cannot establish the required elements of his retaliation claim.

A plaintiff claiming retaliation must establish (1) that he engaged in a protected activity; (2) the employer knew of the exercise of the protected right; (3) subsequent to the protected activity, the employer took materially adverse action against the employee; and (4) there was a causal connection between the protected activity and the adverse action. *See Brooks v. Lexington-Fayette Urban County Hous.*

Auth., 132 S.W.3d 790, 803 (Ky. 2004). Charalambakis cannot establish the required causal connection between his baseless complaint of national origin discrimination[20] and Asbury's decisions to place him on probation and then terminate his employment.

Charalambakis's discrimination claim was premised entirely on two alleged comments that the Provost made in 2007, years before the decisions at issue in this case. Charalambakis never complained about these alleged comments until years later, and **only after** the Provost initiated disciplinary actions against him. Charalambakis is solely responsible for interjecting any discussion of his KCHR charge into Asbury's disciplinary proceedings, and he did so only after it became clear that Asbury had uncovered significant wrongdoing and disciplinary action was inevitable. The timeline of events is undisputed.

- June 17, 2009 – Provost notifies Charalambakis that his job is in jeopardy and requests a face-to-face meeting to discuss the complaints against him. [Appx. 8].
- June 22, 2009 – Charalambakis declines the Provost's invitation to meet[21] and demands a written description of the complaints against him. [Appx. 9].
- June 23, 2009 – Provost sends a three-page memorandum detailing the complaints by the former Asbury students and the revelations about Charalambakis's questionable business dealings.[22] [Appx. 10].

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[20] Furthermore, as explained below, an utterly baseless claim of discrimination is not entitled to KCRA protection.

[21] Charalambakis complains that the Provost declined to meet with him after notifying him of the impending investigation and potential disciplinary action, but the truth is that it was Charalambakis who refused the Provost's invitation to meet.

[22] As the Court will see, this letter lays out the facts and details of the students' complaints and Asbury's concerns about Charalambakis's conduct. Charalambakis's claim that these details were kept from him is simply not true.

- June 30, 2009 – Charalambakis responds with vague denials and accuses Provost *not of discrimination* but of retaliation for Charalambakis's "courageous stands" at the institution and for having "spoken the truth to power."[23] [Appx. 11].

- July 1, 2009 – Charalambakis asks his friend Dave Coulliette for an urgent meeting of the FPC, *not to assess any allegations of discrimination*, but to review the Provost's letter. [Appx. 12].

- July 17, 2009 – Provost writes to Charalambakis giving him another opportunity to provide evidence in his defense. [Appx. 13].

- August 5, 2009 – Charalambakis asks for an FPC meeting to "ensure uniformity in the way in which issues, such as academic integrity, are being handled..." *Charalambakis does not mention discrimination.* [Appx. 14].

- September 8, 2009 – Provost asks again for Charalambakis's evidence[24] and explains the role of the FPC. [Appx. 15].

- September 28, 2009 – Four months into the disciplinary investigation, Charalambakis for the first time accuses the Provost of discrimination based on the Provost's allegedly having mocked his accent in 2007.[25] [Appx. 16].

- November 11, 2009 – Charalambakis directs Prof. Dave Coulliette to tell the Provost that Charalambakis has filed a charge of discrimination with the KCHR. ***This is a lie.*** Although Charalambakis had contacted the KCHR, he did not file a charge until 2010. [Appx. 17, 18].

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[23] Charalambakis had accused prior Asbury administrators and his own colleagues of having cheapened the economics department and the school with their lesser professional qualifications and their diminished view of the department's future [RA Dep. Folder, Pl. depo., pp. 21-22, 221, 229]. According to Charalambakis, he was a member of the "loyal opposition," whose vision remained true to that of Asbury's founders. [Id. at 216-218, 344-345].

[24] Charalambakis often proclaimed the existence of documents proving he committed no wrong, but he never provided any such documents, despite the Provost's frequent requests for them. [VR No. 7: 11/17/11, 4:30:30].

[25] To the extent that Charalambakis claims that his generalized accusation against the Provost was protected activity, it is too vague to qualify as such. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir.1989) (a vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice).

- November 24, 2009 – Provost notifies Charalambakis of his decision to place him on probation for two years during which he is not to engage in any outside business. Provost mentions Charalambakis's "baseless accusations," but only to acknowledge that the allegations "could have no reason other than to try to intimidate this administration in its efforts to complete its review of these matters." [Appx. 19].

- January 13, 2010 – Charalambakis emails Don Zent, chair of his FAC, to tell him that he intends to file a charge of discrimination with the KCHR. Dr. Zent responds "as a friend and colleague" and writes that he hopes that Charalambakis will reconsider, since his discrimination claim has no basis in fact. [Appx. 20].

In April 2010, having so far failed to elicit the desired response to his announcements about his KCHR charge, Charalambakis, through Dave Coulliette, demanded that the Provost immediately issue him a new contract for the next academic year in exchange for his agreement to drop the KCHR charge.[26] [PX46]. Charalambakis tried unsuccessfully to strike the same bargain with the FAC. [Appx. 21]. Shortly after Asbury fired Charalambakis, he voluntarily withdrew his KCHR charge. [RA Dep. Folder, Pl. depo. Ex. 158].

Charalambakis cannot establish a causal connection between Asbury's decision to institute disciplinary action against him in June 2009 and his filing of his baseless KCHR charge in February 2010, the charge having been filed long after the disciplinary proceedings commenced. Employers need not suspend previously planned discipline upon discovering that an employee has filed a charge of discrimination, and their "proceeding along lines previously contemplated, though

[26] Dr. Kulaga never asked Charalambakis to drop his KCHR charge. [RA Dep. Folder, Pl. depo., p. 43].

not yet definitively determined, **is no evidence whatever of causality**."[27] *Clark County School Dist. v. Breeden*, 532 U.S. at 272 (emphasis added). Asbury was contemplating terminating Charalambakis's employment *before* he filed a KCHR charge or made any accusation of discrimination.[28] Indeed, the discrimination allegations only came in Charalambakis's angry reply to the Provost's request for Charalambakis's response to the evidence of his misconduct. "An employee cannot allege discrimination like a protective amulet when faced with the possibility that his preexisting disciplinary problems could lead to his termination." *Beard v. AAA of Michigan*, 2014 WL 6480380 at *4 (6th Cir. 2014)(attached hereto as Appx. Item 22).

Charalambakis's claims that Asbury reacted negatively, even "angrily"[29] to Coulliette's (inaccurate) announcements about Charalambakis's communications with the KCHR are easily disproved. First, Charalambakis incorrectly says that the Provost contacted only one witness, and on the same day as Coulliette's KCHR

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[27] The United States Supreme Court also wrote that the fact that plaintiff Breeden's transfer occurred one month after her employer learned of her discrimination suit was "immaterial in light of the fact that [the employer] concededly was contemplating the transfer before it learned of the suit." *Breeden*, 532 U.S. at 272. Charalambakis complains about the Court of Appeals' statement that temporal proximity between an employment decision and a discrimination charge is "immaterial" when the employer had been contemplating the decision before it learned of the complaint. Charalambakis's argument on this point is unfounded in light of the U.S. Supreme Court's holding in *Breeden*.

[28] Charalambakis argues that the *Breeden* rule gives employers "*carte blanche*" to retaliate because liability can be avoided by threatening disciplinary action before the employee makes a complaint. Charalambakis's argument defies logic as it requires prescience on the part of the employer. The employer cannot know that an employee is going to make a charge of discrimination before it happens. In *Breeden*, as in Charalambakis's case, the employer contemplated the challenged employment decision *before* the employee complained about discrimination. The employment action cannot have been contemplated in retaliation for a discrimination complaint that had not yet been asserted.

[29] Charalambakis and his family members are the only parties that displayed anger during the course of the disciplinary process. (See, e.g., PX 23, DX10). In usual fashion, Charalambakis tries to deflect his own behavior onto others.

announcement.[30] Actually, the Provost testified that he contacted *four* witnesses: Laurence Coppedge, Adam Wood, Ron Smith, and Dale Ahearn.[31] (RA Dep. Folder, Kulaga depo. Day 1, p. 135, Day 2, p. 34, 43).

Charalambakis blatantly misstates the facts when he claims that "things changed" on November 11, 2009, after Coulliette incorrectly repeated Charalamabakis's false claim that he had filed a charge of discrimination. Actually, Provost Kulaga's June 23, 2009 and November 24, 2009 letters[32] focus on the exact same misconduct by Charalambakis: mistreating Adam Wood and attempting to use the Carpe Diem companies to import wine, mistreating Jessica Blackburn and improperly handling funds donated to the non-profits run by Charalambakis, and questionable handling of investments from individual investors in Mississippi, as reported by Laurence Coppedge. Inexplicably, Charalambakis says that the Provost's probation letter does not state whether the allegations of the witnesses were true, or whether they were sufficient to warrant adverse action. On the contrary, the letter explains in detail which of the allegations the Provost credits, and why, and concludes that "it is my judgment that a balanced reading of the documented evidence provided by you, and others, when weighed in an objective manner, clearly indicates that you have engaged in multiple violations of the Faculty

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[30] Charalambakis does not say whether the Provost's November 11, 2009 discussion with the witness (Laurence Coppedge) occurred before or after Coulliette misinformed him of a KCHR charge.

[31] The Provost did not talk to Jessica Blackburn during the investigation because she wrote her allegations in a detailed letter and Coppedge and others corroborated her written statements. (RA Dep. Folder, Kulaga depo. Day 1, 167-168, Day 2, P. 58, 59).

[32] Although the Provost's initial letter to Charalambakis notified him that the alleged misconduct was grounds for termination, the Provost softened his approach and granted probation. Had he been motivated by anger over Charalambakis's contact with the KCHR, he could simply have terminated Charalambakis's employment on November 24, 2009.

Manual – and therefore have provided sufficient cause for termination." (PX3, p. 7). The letter also details the provisions of the Faculty Manual that Charalambakis violated by the misconduct that the Provost concludes did occur.

Charalambakis's argument that Asbury "actively sought" new allegations against Charalambakis after November 11th is likewise incorrect and unsupported by the evidence. Of course, Charalambakis does not describe any action Asbury took in furtherance of this claimed search for new allegations, and there is no evidence of such a search.[33] On the contrary, Provost Kulaga testified that he did no independent investigation of Charalambakis. [RA Dep. Folder, Kulaga depo. Day 1 pp. 135-137]. He only verified the evidence and allegations provided to him in the Spring of 2009. [Id.]

Charalambakis next argues that the second Faculty Appeals Committee's June 7, 2010, notes do not mention the initial allegations of misconduct. He says this is evidence of retaliation. In fact, the second FAC was not reviewing a decision based on the initial misconduct. The first FAC completed that task, and upheld the Provost's decision to offer Charalambakis two years' probation. The second FAC was convened, not to rehash the work the first FAC did, but to determine whether Charalmabakis had breached the terms of his probation agreement. [RA Dep. Folder, Zent depo. Day 1 pp. 66-67]. Accordingly, the second FAC appropriately focused on that question, which was the only question upon which it was authorized to make a decision.

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[33] Asbury did not need to search in order to find additional misconduct by Charalambakis. Charalambakis's ongoing misconduct was readily apparent from his insubordinate and rude letters, among other things.

C. Charalambakis has no direct evidence of retaliation.

Charalambakis next claims that the trial court recognized that he had "direct evidence of retaliation." This is yet another misstatement of the facts. The trial court never said that Charalambakis had any direct evidence of retaliation – on the contrary, the court dismissed the retaliation claim as baseless! (VR: 11/09/11 hearing, 3:06:50).

Direct evidence is that which *requires* the conclusion that unlawful retaliation motivated the challenged decision. *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir.2003). Direct evidence "would 'entail something akin to an admission' by [the decision-maker] that she had a retaliatory motive." *Smith v. Bray*, 681 F.3d 888, 900 (7th Cir. 2012). Direct evidence does not require a factfinder to draw any inferences. *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004). Charalambakis claims that the Provost's statements in the November 24, 2009, probation letter constitute direct evidence of retaliation. The Provost writes that Charalambakis's responses to the Provost's requests for information contained "baseless accusations which can have no reason other than to try to intimidate this administration in its efforts to complete its review of this matter."[34] [PX3]. This statement is found under the heading "Additional Issues that have Developed during the Investigation." Attempting to intimidate one's employer with baseless accusations is *not* protected activity, so the Provost's statement cannot fairly be

[34] In his Brief, Charalambakis claims that Kulaga never denied Charalambakis's discrimination allegations. Clearly, the provost's written statement that Charalambakis's allegations are baseless and made solely for the purpose of intimidation is an unequivocal denial of Charalambakis's accusations.

interpreted as any evidence of retaliation, direct or circumstantial.[35] Furthermore, the Provost mentioned this conduct as an issue that developed during the investigation; he did not state that he was basing the probation decision on that conduct. Therefore, since a factfinder would have to make an inference to connect the Provost's statement to the probation decision, it cannot be direct evidence of retaliation.

Charalambakis next claims that his email correspondence with a member of his Faculty Appeals Committee, Professor Don Zent, constitutes direct evidence of retaliation. Charalambakis emailed Zent to tell him that he intended to file a charge of discrimination against Asbury. Once again, Charalambakis, not Asbury, incorporates Charalambakis's KCHR activity into his disciplinary proceedings. Zent responded to Charalmabakis's email, writing that he hoped that Charalambakis would reconsider, since his discrimination claim has no basis in fact. In other words, Zent discouraged Charalambakis from filing a false claim. Zent testified that he believed that Charalambakis was using the KCHR process as a smokescreen to distract the FAC from the real issues it was convened to sort out. (RA Dep. Folder, Zent depo., p. 90-95). Zent's belief was confirmed when Charalambakis told the FAC that he would drop the KCHR complaint if the Provost would stop the disciplinary proceeding. (Id.) Zent's response to Charalambakis's email announcement of his contact with the KCHR is not direct evidence of retaliation. Zent does not state that he has or will recommend upholding the probation decision because Charalambakis has filed a charge of discrimination. Rather, he opines that pushing unrelated side

[35] The first requirement of a retaliation claim is that the plaintiff must have engaged in activity that is protected under the Kentucky Civil Rights Act.

issues (and Charalambakis had raised many, with the KCHR, the AAUP, and the KJCC) is not useful in defending against the accusations of misconduct made by of Blackburn, Wood, or Coppedge. The Court of Appeals correctly held that Zent's statement was not direct evidence of retaliation because it is subject to a variety of interpretations and requires an inference to show a retaliatory motive.

D. An underlying violation of the KCRA is required to support a KCRA retaliation claim.

According to the only Kentucky case to address the issue directly, a KRS 344.280 retaliation claim must arise from an **underlying violation** of the KCRA. *Parker v. Pediatric Acute Care, P.S.C.*, No. 2007-CA-000548-MR, 2008 WL 746677 (Ky. App. March 21, 2008) (attached hereto as Appendix Item 23).[36]

In *Parker*, the plaintiff complained that she experienced harassment when her co-workers publicly gave her a gift card to a sex-themed novelty shop and her employer refused to take action in response to her complaints about the gift. When she was fired a few months later, Ms. Parker claimed that the action was in retaliation for her harassment complaint. The trial court found that Ms. Parker's allegations did not amount to an actionable hostile work environment claim. The trial court further held that without an underlying discrimination claim, Ms. Parker could not establish the elements of her retaliation claim. In affirming the trial court's rulings, the Court of Appeals explained that a plaintiff must establish a violation of the KCRA to maintain a retaliation claim. "Having determined that Parker has not offered proof sufficient to sustain her claim of being subjected to a

[36] Asbury cites the *Parker* case pursuant to CR 76.28(4)(c).

sexually hostile work environment, the circuit court properly concluded that Parker could not proceed with the retaliation claim."

Likewise, in *Himmelheber v. ev3, Inc.*, Civil Action No. 3:07-CV-593-H, 2008 WL 360694 (W.D. Ky. Feb. 8, 2008), the U.S. District Court for the Western District of Kentucky explained that "if no 'practice declared unlawful by [the KCRA]' has occurred, there can be no retaliation or discrimination as contemplated by Ky. Rev. Stat. § 344.280." The *Himmelheber* plaintiff complained that her employer placed her on a performance improvement plan, and when she complained that the discipline was the result of gender discrimination, fired her in retaliation for making her complaint. The plaintiff failed to establish the elements of her gender discrimination claim. The court held that she could not succeed on her retaliation claim in the absence of an underlying KCRA violation.

In *Thompson v. Next-tek Finishing, LLC*, Civil Action No. 3:09-CV-940-S, 2010 WL 1744621 (W.D. Ky. April 28, 2010),[37] the plaintiff claimed that her employer altered her work environment after she revealed that she was pregnant, and then fired her for complaining about discrimination. After dismissing the plaintiff's discrimination claim, the court reasoned,

> "[R]etaliation" is illegal only if it comes "because [the plaintiff] has opposed a practice declared unlawful by this chapter." KRS 344.280. A predicate for invoking [the retaliation] cause of action is the existence of an illegal practice for the aggrieved plaintiff to oppose; "if no practice declared unlawful by this chapter has occurred, there can be no retaliation or discrimination as contemplated by KRS 344.280."

[37] Copies of *Thompson* and *Himmelheber* are attached as Appendix Items 24 and 25.

Id. at *2, *quoting Himmelheber v. ev3, Inc., supra.* Accordingly, the court dismissed the plaintiff's retaliation claim. Likewise, because Charalambakis failed to establish the elements of his national origin discrimination claim, he lacked a required element of a retaliation claim, and could not proceed to trial on that claim.

Charalambakis misframes this issue in his Brief. He argues that he should not have to *succeed* on his national origin claim in order to bring his retaliation claim, and that issue is whether or not he has offered any evidence that could reasonably support the claim. There is a clear distinction between offering proof that could sustain a claim and actually succeeding on a claim. Charalambakis failed even to establish the essential elements of his national origin claim. He has no evidence from which a reasonable jury could determine that Provost Kulaga held discriminatory animus against him because he is Greek. Charalambakis relies on two comments about his accent, allegedly made in 2007, completely unrelated to any adverse action. As a matter of law, those isolated comments made years before the employment decisions about which he complains cannot support a discrimination claim. Pursuant to *Parker*, Charalambakis's retaliation claim fails because he "has not offered proof sufficient to sustain [his] claim of being subjected to [national origin discrimination]."

Charalambakis fails to mention that the Court of Appeals did <u>not</u> rely on *Parker*, or Charalambakis's utter lack of proof of discrimination, to uphold the trial court's summary judgment dismissing his retaliation claim. Instead, the Court of Appeals found that Charalambakis could not establish a causal relationship between his protected activities and Asbury's employment decisions because

Charalambakis's protected activities came *after* Asbury had commenced disciplinary proceedings and *after* Asbury informed Charalambakis that it was contemplating terminating his employment. [*Charalambakis v. Asbury*, Kentucky Court of Appeals' Opinion, No. 2012-CA-000242-MR (January 31, 2014) "*Charalambakis* Opinion", p. 20-21]. Common sense, and *Breeden* and its progeny, establish that protected activity that comes after disciplinary action has begun cannot be the legal cause of the pre-existing disciplinary action.

The Court of Appeals also noted that Charalambakis *agreed* to the terms of his probation, one of which was to "immediately cease any efforts to challenge this process through any other venue." Charalambakis was the first to suggest waiver of his charge in exchange for continued employment. (RA Dep. Folder, Pl. depo. Ex. 121). As the Court of Appeals wrote, "statutory discrimination claims can be affirmatively waived by agreement," so long as the waiver does not purport to release prospective rights. [*Charalambakis* Opinion, p. 17, citing *Humana, Inc. v. Blose*, 247 S.W.3d 892 (Ky. 2008), *Adams v. Philip Morris, Inc.*, 67 F.3d 580 (6th Cir. 1995), and *Hamilton v. General Elec. Co.*, 556 F.3d 428 (6th Cir. 2009).] Asbury accepted Charalambakis's suggestion of waiver as part of the probation terms to which Charalambakis agreed in writing. For Charalambakis to now claim that by taking him up on his offer, Asbury has created direct evidence of discrimination is dishonest.

E. Title VII requires as an element of a retaliation claim a plaintiff's good faith, reasonable belief that the employer's conduct amounted to unlawful discrimination.

Charalambakis urges the Court to rely on federal law to find that there is no requirement of an underlying KCRA violation to support a KCRA retaliation claim. However, Charalambakis's claims clearly fail under any federal interpretation of discrimination law. In order to receive protection under the federal anti-retaliation statute, a plaintiff must have a good faith, reasonable belief that the conduct he opposes constitutes unlawful discrimination. *Wasek v. Arrow Energy Servs.*, 682 F.3d 463, 469 (6th Cir. 2012); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). *See also Clark County School Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (dismissing plaintiff's retaliation claim upon finding that no one could reasonably believe that the underlying allegation violated Title VII). "Utterly baseless claims do not receive protection under Title VII." *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004). The purpose of requiring that plaintiffs reasonably believe in good faith that they have suffered discrimination is clear. Title VII was designed to protect the rights of employees who in good faith protest the discrimination they believe they have suffered and to ensure that such employees remain free from reprisals or retaliatory conduct. Title VII was not designed to "arm employees with a tactical coercive weapon" under which employees can make baseless claims simply to "advance their own retaliatory motives and strategies." *Id.*

III. Charalambakis improperly cites the non-final *Powell* Opinion, which has no precedential value, and is irrelevant.

Charalambakis claims that the Court of Appeals' Opinion conflicts with the non-final decision of the Court in *Asbury v. Powell*, No. 2012-CA-653 (January 31,

2014) now being briefed to this Court. Charalambakis's citation of a non-final Opinion is improper. *State Farm Ins. Co. v. Edwards*, 339 S.W.3d 456, 459 at n. 2 (Ky. 2011). "While CR 76.28(4)(c) now permits the citation of unpublished appellate opinions rendered after January 1, 2003, the rule does not extend to opinions that are not final, for **clearly there can be no precedential value to a holding that is still being considered.**" *Id. citing Alexander v. Commonwealth*, 220 S.W.3d 704 (Ky. App. 2007)(emphasis added).

In any event, there is nothing in the *Powell* Opinion that would require a different result in the present case. Charalambakis complains that he has a stronger case than Powell, who lost her sex discrimination claim at trial, but prevailed on her retaliation claim. Powell was a basketball coach with a yearly contract, not a tenured professor. This comparison is meaningless because the *Powell* Opinion is non-final and cannot be considered by the Court, and because the facts of the two cases are entirely distinct. In any event, neither Charalambakis nor Powell has a meritorious claim. As Charalambakis points out, Powell's alleged protected activity also occurred years before Provost Kulaga decided not to renew her contract following her team's complaints about her embarrassing public displays of affection with her subordinate, assistant coach Heather Hadlock. Further, Asbury had not even hired Kulaga at the time when Powell complained of alleged gender discrimination, and Asbury underwent two changes in administration between Powell's complaint and her discharge, extinguishing any inference of a causal connection between the complaint and the termination decision.

The facts of Charalambakis's case are very different, but also insufficient to establish the causation element of his retaliation claim. Charalambakis did not ever mention discrimination until months after his disciplinary proceedings were underway. Employers need not suspend previously planned discipline upon discovering that an employee has interposed a charge of discrimination, and their "proceeding along lines previously contemplated, though not yet definitively determined, **is no evidence whatever of causality**." *Clark County School Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (emphasis added). Charalambakis made his accusations in belated response to the Provost's investigation of his misconduct and in an attempt to circumvent the disciplinary action that the Provost intended to impose on him. In short, Charalambakis's discrimination allegations were fabricated as a reaction to threatened discipline, while Powell's allegations were entirely unrelated to her termination. Neither one has a meritorious retaliation claim under any standard.

Charalambakis claims that Kulaga's disciplinary decisions were negative reactions to protected activity, but there is no evidence to support that assessment. On the contrary, months prior to Charalambakis's first vague assertion of discrimination, Kulaga had stated that Charalambakis's misconduct was grounds for termination. The Provost then opted for the lesser sanction of probation. The Provost actually softened his approach after learning of Charalambakis's accusations.

Next, Charalambakis seeks to compare his pretext evidence to Powell's. Once again, the Court should not even consider the comparison because *Powell* is non-

final, and the comparison makes no sense because the cases are not related or even similar. Moreover, Charalambakis's opinion that his evidence was stronger than Powell's makes no difference in the outcome of his case, or hers. As to Asbury's reasons for placing Charalambakis on probation and then firing him, Asbury's Provost, President, two Faculty Appeals Committees, the jury at the trial of this matter, and now the Court of Appeals have all unanimously concluded that Asbury had adequate cause to terminate Charalambakis's employment. Charalambakis told the jury about his allegations of discrimination and retaliation. [VR 11/14, 5:15:05]. His letters alleging discrimination and retaliation were trial exhibits. [PX8, PX10]. Charalambakis argued in closing that discrimination and retaliation are never legitimate reasons to terminate a professor's employment. [VR No. 9: 11/18/11, 3:07:43-3:09:00]. The jury ruled against Charalambakis's discrimination and retaliation allegations by finding that Asbury had sufficient cause to terminate his employment.

Charalambakis next claims that his case is like Powell's because Provost Kulaga destroyed his own writings in each case, and failed to follow protocol in each case. As to Powell, the Court of Appeals inaccurately stated that Kulaga destroyed "emails regarding his investigation into [Powell's] assertions [and failed] to follow protocol in dealing with the allegations of gender discrimination." [*Powell* Op., p. 7]. In fact, Powell admitted that she never raised any allegations of gender discrimination with Kulaga, and her gender discrimination grievance was resolved two years and two administration changes before Asbury hired Kulaga. Powell admitted that she never made any complaint or grievance to Kulaga. Clearly, Kulaga

could not have failed to follow protocol related to a gender discrimination complaint that was not made, nor could he have destroyed emails about an investigation of a non-existent complaint. As to Charalambakis, it was he, and not the Provost, who failed to follow protocols when he attempted to convene the FPC to hear his objections to the Provost's discipline decisions. [RA Dep. Folder, Pl. depo. Ex. 60]. The Faculty Manual states that the FPC reviews policies about personnel matters, while the FAC reviews disciplinary actions and other grievances. [JX1, p. 48, 52]. Finally, the jury has already decided that Asbury did not breach Charalambakis's contract of tenure by firing him without FPC review, so this is a moot point.

CONCLUSION

Charalambakis engaged in significant misconduct while employed by Asbury, leading to multiple complaints about him to the University, and the eventual termination of his employment. Charalambakis has obtained review of Asbury's disciplinary decisions from two Faculty Appeals Committees, Asbury's President, the trial court, a jury, and now the Court of Appeals, all of which have unanimously upheld the decisions. No fact or law has been overlooked, no concept misconceived.

Civil rights laws are "not designed to 'arm employees with a tactical coercive weapon' under which employees can make baseless claims simply to 'advance their own retaliatory motives and strategies.'" *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004). Nor are they intended to be used "like a protective amulet when faced with the possibility that ... preexisting disciplinary problems could lead to ... termination." *Beard v. AAA of Michigan*, 2014 WL 6480380 at *4 (6th Cir. 2014). Charalambakis made a charge of discrimination for the sole purpose of

manipulating his ongoing disciplinary process. He did not even try to conceal his motive in filing the charge. Rather, he used the charge as a bargaining chip at every opportunity, telling both the Provost (through his friend Dave Coulliette) and his Faculty Appeals Committees that he would drop the KCHR charge in exchange for a finding in his favor in his disciplinary proceedings.

Charalambakis has no evidence from which a reasonable jury could find national origin discrimination. He cannot establish that Asbury's employment decisions were motivated by unlawful retaliation because he did not engage in protected activity until after Asbury had commenced his disciplinary proceedings. Moreover, the jury's unassailable finding that Asbury had sufficient cause to terminate Charalambakis's employment precludes a finding that Asbury would not have made that decision but for Charalambakis's belated filing of a KCHR charge. Based on the undisputed facts herein, Charalambakis's retaliation claim could never survive under *Nassar*.

Appellees respectfully request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

Debra Dawahare (by LGO w/permission)

Debra H. Dawahare
WYATT, TARRANT & COMBS, LLP
250 West Main Street, Suite 1600
Lexington, Kentucky 40507-1746
(859) 288-2013
Fax: (859) 259-0649
Counsel for Appellees

Leila G. O'Carra

Leila G. O'Carra
WYATT, TARRANT & COMBS, LLP
250 West Main Street, Suite 1600
Lexington, Kentucky 40507-1746
(859) 288-2013
Fax: (859) 259-0649
Counsel for Appellees